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No. 89-1641

In The
Supreme Court of the United States
October Term, 1990

Elizabeth H. Dole, Secretary of Labor,
United States Department of Labor,
Petitioner,

v.

Occupational Safety and Health
Review Commission

and

CF&I Steel Corporation,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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Pursuant to the instructions of the Clerk of the Court, the Occupational Safety and Health Review Commission (Commission) respectfully moves for leave to file the attached brief amicus curiae in support of the Respondents. The Solicitor General has authorized and consented to the filing of this brief, and Respondent CF&I Steel Corporation has also consented to its filing. These consent letters have been filed with the Clerk. However, because the Solicitor General has limited his authorization to the filing of an amicus brief (even though the Commission is named as a Respondent in the proceeding), the Clerk has instructed the Commission to move for leave to file the attached brief.

The Commission was created by the Occupational Safety and Health Act of 1970 (OSH Act), Pub. L. No. 91-596, 84 Stat. 1590, 29 U.S.C. §§ 651-678. The OSH Act delegates to the Commission the responsibility for all administrative adjudications under the statute. In fulfilling these responsibilities, the Commission often is called upon to interpret both the OSH Act and the regulations promulgated by the Secretary of Labor (to whom rulemaking responsibility is delegated). These interpretations often determine the outcome of proceedings before the Commission. The Commission thus has a vital and recurring institutional interest in the proper resolution of the question presented—to wit, whether its orders are controlling on the courts when the Secretary disagrees with the Commission's reasonable interpretation of an ambiguous regulation.

Because of the Commission's institutional interest in the case and experience with the administrative scheme of the OSH Act, it believes that its views would be helpful to the Court in resolving the question presented. Accordingly, the Commission respectfully moves for leave to file the attached brief amicus curiae in support of Respondents.

Respectfully submitted,

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September 1990

QUESTION PRESENTED

Whether an order of the Occupational Safety and Health Review Commission adopting a permissible interpretation of an ambiguous regulation that implements the Occupational Safety and Health Act is controlling on the courts when the Secretary of Labor disagrees with the Commission's interpretation.

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BRIEF FOR THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS

The interest of the amicus is set forth in the motion accompanying this brief.

STATEMENT

1. In the Occupational Safety and Health Act of 1970 (Act or OSH Act), Pub. L. No. 91-596, 84 Stat. 1590, 29 U.S.C. §§ 651-678, Congress attempted "to assure so far as possible [that] every working man and woman in the Nation [has] safe and healthful working conditions . . . ." 29 U.S.C. § 651(b). To achieve this goal, Congress among other things "authoriz[ed] the Secretary of Labor to set mandatory occupational safety and health standards[,] . . . and . . . creat[ed] an Occupational

Safety and Health Review Commission for carrying out adjudicatory functions." *Id.* § 651(b)(3). The Occupational Safety and Health Review Commission (Commission) is an administrative body established by the Act that is composed of three members appointed by the President, with the advice and consent of the Senate, who possess the "training, education, or experience" necessary "to carry out the functions of the Commission." *Id.* § 661(a).

With regard to the establishment of safety and health standards under the Act, Congress provided that the Secretary must promptly by "rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless [she] determine[d] that the promulgation of such a standard would not result in improved safety or health for specifically designated employees." 29 U.S.C. § 655(a). Congress further provided that, in the event of "conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees." *Id.* Congress, however, also established elaborate procedures—involving use of advisory committees, notice and comment requirements, hearings, and delays in effective dates—that the Secretary must follow in promulgating, modifying, or revoking any such safety or health standard. *Id.* § 655(b). Finally, it provided that any person adversely affected by any such safety or health standard could directly challenge the legality of that standard in an appropriate court of appeals. *Id.* § 655(f).

With regard to the implementation of promulgated safety and health standards, Congress provided the Secretary with certain enumerated enforcement powers. *See* 29 U.S.C. §§ 657-659. Among other things, it authorized the Secretary to enter, inspect, and investigate places of employment for compliance with such safety and health standards. *Id.* at § 657(a). Congress further provided that, if upon inspection or investigation, "the Secretary or his authorized representative believes that an employer

has violated" any such standard, she may issue a citation which describes with particularity the nature of the alleged violation, sets a reasonable time period for abatement of the violation, and, depending upon the circumstances, proposes a civil penalty (ranging from zero to $10,000 per violation). *Id.* §§ 657-658, 666(a)-(c). Congress also provided, however, that such a citation is enforceable only as a final "order" of the Commission, and that the authority actually to assess a civil penalty lies exclusively with the Commission. *Id.* §§ 659(a), 666(j).

Specifically, an uncontested citation is by statute "deemed a final order of the Commission and not subject to review by any court or agency." 29 U.S.C. § 659(a), (b). Where a citation is contested (by either an employer, an employee, or a representative of an employee or group of employees), the Commission must hold a hearing in accordance with the provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq. *See* 29 U.S.C. § 659(c). "At [the] hearing the burden is on the Secretary to establish the elements of the alleged violation and the propriety of his proposed abatement order and proposed penalty." *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 446 (1977). The Commission must "thereafter issue an order, based on findings of fact, affirming, modifying or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief . . . ." 29 U.S.C. § 659(c).[1]

Any private party "adversely affected or aggrieved by an order of the Commission" may petition for review of that order in an appropriate court of appeals. 29 U.S.C. § 660(a). The Secretary also may petition for judicial "review or enforcement of any final order of the Commission." *Id.* § 660(b). The Act generally limits judicial review to objections that were "urged before the Commission," and specifically provides that the Commis-

[1] Prior to the issuance of any such order, the Secretary retains her traditional prosecutorial discretion to withdraw a citation. *See Cuyahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3, 6-7 (1985) (per curiam).

sion's factual findings, "if supported by substantial evidence on the record considered as a whole, shall be conclusive." *Id.* § 660(a). Concomitantly, the Commission's ruling on questions of law, pursuant to the interstitial provisions of the APA, must be sustained unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

2. In 1976, the Secretary adopted a standard regulating exposure to coke oven emissions. *See* 41 Fed. Reg. 46,742-90 (1976); 29 C.F.R. § 1910.1029. Subsection (g) of this standard concerns the provision and use of respirators, which are considered a permissible means of reducing exposure to coke oven emissions in certain circumstances. *See* 29 C.F.R. § 1010.1029(g). Among other things, subsection (g) requires the employer to "assure that the respirator issued to the employee exhibits minimum facepiece leakage and that the respirator is fitted properly." *Id.* § 1910.1029(g)(4)(i). It also requires the employer to "institute a respiratory program in accordance with [29 C.F.R.] § 1910.134." 29 C.F.R. § 1910.1029(g)(3).

The standard at 29 C.F.R. § 1910.134, which was adopted by the Secretary without resort to "notice and comment" rulemaking pursuant to the provisions of 29 U.S.C. § 655(a), is the general industry standard for respiratory protection. 36 Fed. Reg. 10,466 (1971). It was not created by the Secretary, but instead was developed by the American National Standards Institute (ANSI), a private standards-setting organization, and is based on the ANSI standard designated Z88.2-1969, Standard Practice for Respiratory Protection. 36 Fed. Reg. 10,593 (1971); 29 C.F.R. § 1910.139. The general respiratory protection standard provides in relevant part:

> For safe use of any respirator, it is essential that the user be properly instructed in its selection, use, and maintenance. Both supervisors and workers shall be instructed by competent persons. Training shall provide the men an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and, finally, to wear it in a test atmosphere.

29 C.F.R. § 1910.134(e)(5).

3. In August 1979, a compliance officer from the Occupational Safety and Health Administration (OSHA), an office within the Department of Labor to which the Secretary has delegated many of her OSH Act responsibilities, conducted a follow-up inspection of a Pueblo, Colorado coke oven facility of CF&I Steel Corporation (CF&I) to assess whether the coke oven emissions standard was being followed there. Pet. App. 19a. The compliance officer found that, before they were assigned to a regulated area, CF&I employeees were given respirators, told when to use them, and shown how to perform a "positive/negative pressure test"—*i.e.*, how to place the respirators on their faces and to check for leaks by inhaling and exhaling. *Id.* at 37a-38a. The compliance officer also found that employees were shown a film illustrating the proper use and fit of a respirator, and given another test in which they were exposed to a noxious chemical, isoamyl acetate (or "banana oil"), in a contained environment to determine if they detected the odor despite wearing a respirator. *Id.* at 38a. Finally, he found that workers who did detect the odor were not given replacement respirators, but were instead allowed to work with the same respirators in areas where exposure to coke oven emissions was possible. *Id.* at 38a-39a.

Based on these findings, the Secretary, through her compliance officer, cited CF&I for a "willful violation" of the coke oven emissions standard and proposed that a $10,000 penalty be assessed by the Commission. Pet. App. 3a, 43a. In doing so, however, the Secretary only cited CF&I for a violation of 29 C.F.R. § 1910.1029(g)(3) and the general standard on respiratory protection incorporated therein (*i.e.*, 29 C.F.R. § 1910.134). Pet. App. 43a-44a. The Secretary purposefully did not cite CF&I for a violation of 29 C.F.R. § 1910.1029(g)(4)(i), which

directly requires employers to "assure that the respirator issued to an employee . . . is fitted properly," because her compliance officer believed, albeit incorrectly, that an OSHA policy directive had suspended enforcement of that provision in light of an adverse court of appeals' decision. Pet. App. 43a-44a & n.13. Although CF&I pointed out the error, the Secretary chose not to move to amend the citation. *Id.* at 43a-44a, 45a n.15.

4. When CF&I contested the citation, an administrative law judge of the Commission held a hearing on the matter and recommended that the citation be affirmed. Pet. App. 57a-61a, 76a-82a, 90a. On review, however, the Commission determined that 29 C.F.R. § 1910.1029(g)(4)(i) "is specifically applicable to the cited condition and should have been cited by the Secretary instead of section 1910.1029(g)(3)." Pet. App. 40a. It further determined—based on the language of the regulations in issue, the source standard from which the incorporated regulation (*i.e.*, 29 C.F.R. § 1910.134) was derived, and the inconsistency of OSHA compliance instructions concerning this issue—that 29 C.F.R. § 1910.1029(g)(3), through the incorporation of 29 C.F.R. § 1910.134(e)(5), is a "training standard" and does not require "the employer to assure proper fit of an employee's respirator." Pet. App. 40a-43a. Finally, the Commission determined that CF&I's training program satisfied the requirements of the incorporated standard, 29 C.F.R. 1910.134(e)(5). Pet. App. 43a-45a. Accordingly, the Commission concluded that the Secretary had failed to prove a violation of 29 C.F.R. § 1910.1029(g)(3) and ordered that the citation be vacated. Pet. App. 45a.[2]

5. On petition by the Secretary for review of the Commission's order, the court of appeals affirmed. Pet. App.

[2] One Commissioner dissented. Pet. App. 51a-54a. While this Commissioner did not "take serious issue" with the conclusion that 29 C.F.R. § 1910.134 is a "training standard," he believed that the requirements of that standard had not been satisfied; in his view, the employees who detected banana oil "certainly were not trained in the use of respirators." Pet. App. 52a.

1a-11a. It found itself facing two competing interpretations: the Secretary supported the compliance officer's construction of § 1910.1029(g)(3) as a testing standard for proper respirator fit, while the Commission construed it as a training standard. Pet. App. 4a. For the court, the question became: "to whom is deference owed?" *Id.*

In answering this question, the court determined that, although both the Commission and the Secretary have administrative roles under the Act, the statutory text is "unclear" concerning who has "final interpretive authority over OSHA regulations." Pet. App. 5a-6a. The court found in the legislative history, however, a clear indication that "Congress sought to endow the Commission with the normal complement of adjudicative powers possessed by traditional administrative agencies" and that "[s]uch an adjudicative function necessarily encompasses the power to 'declare' the law." *Id.* at 7a. Accordingly, the court concluded that, "where the Secretary has failed to convey the meaning of an OSHA regulation to those charged with construing it, . . . we will defer to [a reasonable] interpretation of the Commission." *Id.*

The court conceded (Pet. App. 7a) that several courts of appeals have reached a different conclusion due, in part, to a statement concerning the Benefits Review Board's interpretive authority under the Longshoreman's and Harbor Worker's Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, that is contained in a footnote in *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 278 n.18 (1980) (*Pepco*). The court below, however, considered the *Pepco* footnote to be "dicta," and refused to extend the conclusion of that footnote to the OSH Act setting. Pet. App. 7a-8a. The court additionally observed (*id.* at 8a) that administrative adjudication under the LHWCA is distinguishable in several significant ways from administrative adjudication under the OSH Act.[3]

[3] In particular, the court noted that LHWCA adjudications are nonaccusatory, with a private citizen acting as prosecutor. Pet. App. 8a. OSH Act adjudications, in contrast, are accusatory in nature. *Id.* Moreover, the agency acts as prosecutor in the OSH Act scheme,

Finally, the court determined that "it cannot be said that the Commission's interpretation of § 1910.1029(g)(3) in this case was unreasonable." Pet. App. 10a. The court found the structure of § 1910.1029(g)—requiring training through subsection (g)(3) and proper fit through subsection (g)(4), as well as § 1910.134's textual limitation to "training," to support the Commission's view. Pet. App. 10a. Although the court found possible support for the Secretary's view as well, it deemed itself obliged to defer to the Commission's view and advised the Secretary to "amend or clarify" her regulations if she continues to disagree. *Id.* at 11a.

SUMMARY OF ARGUMENT

A. This Court has long instructed that administrative interpretations of statutes and regulations are, in appropriate circumstances, entitled to deference from the courts. Where an agency has special expertise in a particular area, the Court has directed the courts to look to that agency's interpretations for guidance in resolving questions arising in that area. Where an agency has a delegation of lawmaking power in a particular area, the Court has instructed that the courts should give "controlling weight" to reasonable agency interpretations of ambiguous regulatory provisions in that area. Contrary to the Secretary's suggestion, however, the Court has not indicated that conferral of such lawmaking power on the agency is itself sufficient to bind the courts to the agency's interpretations; rather, the Court has indicated that, to bind the courts, the administrative interpretations must be in a form that Congress intended to have the force and effect of law.

B. In this case, the only administrative interpretation in a form that has the force and effect of law is the order of the Commission. The Commission's interpretation is based on both its special expertise and its delegated administrative adjudicatory powers; and it was expressed

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making the need for a separation of administrative functions "far more acute." *Id.*

in a formal, self-executing, legal order issued at the conclusion of a full adjudication of questions of law and fact. It is thus binding on the parties and the courts. By contrast, the Secretary's interpretation was expressed only in a citation issued by one of her compliance officers and in her lawyers' pleadings. An interpretation expressed in such unauthoritative forms does not establish a legally binding norm and thus is not entitled to "controlling weight" in the courts.

C. The Secretary's contrary argument rests on a misapplication of the allocation of administrative authority under the OSH Act. While Congress did delegate rulemaking and enforcement power to the Secretary, it expressly declined to give the Secretary the power to develop binding interpretations through the adjudicative process. Rather, it denied the Secretary adjudicative powers, and endowed the Commission with the full complement of such powers, including the power to declare the law; indeed, the legislative history shows that the Commission was modelled after the National Labor Relations Board and the Federal Trade Commission, two agencies which have long exercised policymaking authority through adjudication. Congress specifically required the Commission to have the technical expertise and experience in the field of job safety that the Secretary erroneously claims the Commission lacks, and it designated the Commission as the final authority with respect to legal and factual issues arising in the adjudicative process in order to reassure the regulated community that this process woud be a fair and efficient one. To accomplish Congress' objective, deference must be given to the Commission, not to the Secretary.

ARGUMENT

A COURT MUST DEFER TO A REASONABLE INTERPRETATION OF AN AMBIGUOUS OSH ACT REGULATION THAT IS EMBODIED IN AN ORDER OF THE COMMISSION EVEN THOUGH THE SECRETARY OF LABOR DISAGREES WITH THAT INTERPRETATION

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court reaffirmed that, where a governing statute or regulation is ambiguous, the courts must give controlling weight to a reasonable interpretation of that statute or regulation by an administrative agency charged with responsibility for filling in the interstices of that regulatory scheme. The Secretary apparently does not contend that the regulations at issue in this case are unambiguous or that the Commission's order rests on a wholly impermissible interpretation of them. *See* Pet. Br. 20-21 n.17, 37-38 n.37. Nevertheless, the Secretary contends that the court below erred in deferring to the Commission's views instead of her's. This contention is wrong.

A. An Administrative Interpretation Is Entitled To Controlling Weight Under *Chevron* Only When It Constitute An Authoritative Exercise Of Delegated Lawmaking Power By An Agency Charged With Filling In The Interstices Of A Regulatory Scheme

In arguing that the courts must give controlling weight to her views (and not to the Commission's views), the Secretary repeatedly asserts that her status as a "policymaker" under the OSH Act is some sort of talisman automatically triggering *Chevron*-style deference. *See* Pet. Br. 18-20, 22, 27, 29. This argument misunderstands *Chevron* and the administrative law principles underlying it.

1. This Court has long recognized that administrative interpretations of statutes and regulations are, in appropriate circumstances, entitled to deference from the courts. *See, e.g., NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944). The traditional justification for the courts doing so is that, in carrying out their functions, agencies typically develop expertise in regulated subject areas and have superior insights into the proper resolution of the polycentric problems that arise in those areas. *See International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 556 n.20 (1979). As the Court made clear in *Chevron*, however, judicial deference can also be a product of the "legislative delegation to an agency." 467 U.S. at 844. Congress often explicitly or implicitly leaves "a gap for the agency to fill" and, "[i]n such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do." *Id.* at 844, 866.

When deference is prompted by such a legislative delegation, it has a different, and more significant, effect than does deference prompted by mere agency expertise. *Accord, General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-142 (1976); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). When judicial deference is prompted by mere agency expertise, agency interpretations are "not controlling upon the courts by reason of their authority[,] [but merely] . . . constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140. In contrast, when judicial deference is prompted by a legislative delegation, reasonable interpretations of ambiguous regulatory provisions may be entitled to "controlling weight"—*i.e.*, they may bind the courts to the agency's view. *Chevron*, 467 U.S. at 844, 865-66. *See also IRS v. FLRA*, 110 S. Ct. 1623, 1624 (1990).

2. Of course, while "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority," *Adams Fruit Co. v. Barrett*, 110 S. Ct. 1384, 1390 (1990), such a legislative delegation is only a necessary condition for *Chevron*-style deference; it is not by itself sufficient to bind the courts. Rather, this Court has indicated that the administrative interpretation being reviewed must also be in a form that Congress

intended to have the force and effect of law. *See Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

a. As courts and commentators (such as the Administrative Conference of the United States) have recognized, there are sound reasons why "controlling weight" should be given only to administrative interpretations that are in a form which Congress intended to have the force and effect of law. *See* 1 C.F.R. § 305.89-5 (Administrative Conference Recommendation 89-5). *See generally* Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 Yale J. on Reg. 1, 4-5, 30-36 (1990). Such a requirement ensures that an agency cannot bind the courts (or the public) without also binding itself. *See* Anthony, *supra*, 7 Yale J. on Reg. at 4-5; *see also Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536-39 (D.C. Cir. 1986) (Scalia, J.). Moreover, such a requirement prevents an agency from evading the procedures that Congress has established for ensuring that administrative rules do not become legally enforceable without public or adversarial debate. *Accord, Morton v. Ruiz*, 415 U.S. 199, 230-36 (1974). And, finally, such a requirement provides assurance that binding legal rules will be established only by agency heads and other politically accountable officers—and not by lower-level officials or staff counsel. *See Heckler v. Chaney*, 470 U.S. 821, 836-37 n.5 (1985).

b. Occasionally, Congress will expressly specify which agency interpretations it intends to have the force and effect of law and thus be binding on the courts. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 842-44; *Fort Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566-68 (1980). In the absence of such an express specification, however, the APA provides the governing standards. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 221 (Scalia, J., concurring). It distinguishes between administrative actions generally having the force and effect of law and those that do not. *See id.*

The APA identifies a fundamental dichotomy of administrative functions between "rule making" and "adjudication" and defines both by reference to their culminating event: " 'rule making' means agency process for formulating, amending, or repealing a rule," and " 'adjudication' means agency process for the formulation of an order." 5 U.S.C. §§ 551(5), (7). The "rules" and "orders" that result from these processes are defined terms under the APA [4] and, while they do not exhaust the forms of authoritative agency action under the APA, they constitute the bulk of them. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 216 (Scalia, J., concurring).

The primary distinction between a "rule" and an "order" is that, while an order "has future as well as past consequences, since the principles announced in adjudication cannot be departed from in future adjudications without reason," a rule "is a statement that has legal consequences only for the future." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 216 (Scalia, J., concurring). Ultimately, however, "rules" and "orders" have as their purpose the expression of governing legal standards —"[a]djudication deals with what the law was; rulemaking deals with what the law will be." *Id.* at 221 (Scalia, J., concurring). "Rules" and "orders" are thus the principal means by which agencies establish the kinds of binding legal norms that are eligible for *Chevron*-style deference. *Accord, Batterton v. Francis*, 432 U.S. at 425 & n.9. *See generally*, 1 C.F.R. § 305.89-5 (Administrative Conference Recommendation 89-5); Anthony, *supra*, 7 Yale J. on Reg. at 4-5.

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[4] "Rule" is defined in relevant part as:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . .

5 U.S.C. § 551(4). "Order," in turn, is defined in relevant part as:

> the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making . . . .

Id. § 551(6).

By contrast, under the APA, interpretive rules, mere statements of agency policy, manuals, guidelines, staff instructions, and agency litigation positions generally do not establish binding legal norms. *See Batterton v. Francis*, 432 U.S. at 425 n.9; *McKee v. Sullivan*, 903 F.2d 1436, 1438 n.3 (11th Cir. 1990); *Church of Scientology v. IRS*, 792 F.2d 153, 162 n.4 (D.C. Cir. 1986) (en banc), *aff'd*, 484 U.S. 9 (1987); *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1017 (9th Cir. 1987); *Pacific Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974). Accordingly, they are not eligible for *Chevron*-style deference. *Accord, Batterton v. Francis*, 432 U.S. at 425 n.9; *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 213. *See generally* 1 C.F.R. § 305.89-5 (Administrative Conference Recommendation); Anthony, *supra*, 7 Yale. J. on Reg. at 55-61.

c. This Court's administrative law cases follow the basic approach of the APA to the *Chevron*-style deference issue. Interpretations developed through formal rulemaking procedures have been the paradigm candidates for *Chevron*-style deference. *See, e.g., Sullivan v. Everhart*, 110 S. Ct. 960, 963, 964-66 (1990). Less formal agency rules have also, in appropriate circumstances, received *Chevron*-style deference. *See Young v. Community Nutrition Inst.*, 476 U.S. 974, 978 (1986); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 438-39 (1986). And, of course, final agency orders entered in the process of adjudication have been recognized as appropriate candidates for *Chevron*-style deference. *See, e.g., Fort Stewart Schools v. FLRA*, 110 S. Ct. 2043, 2046 (1990); *Pattern Makers' League v. NLRB*, 473 U.S. 95, 114 (1985). But the Court has never applied the *Chevron*-deference principle "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 212. Indeed, it has indicated that interpretive guidelines are not binding on the courts. *See Batterton v. Francis*, 432 U.S. at 425 n.9.

3. That mere statements of policy and litigation positions are not binding "rules" or "orders" (and thus not entitled to "controlling weight" under *Chevron*) does not mean that they are not entitled to any weight at all. *See Gardebring v. Jenkins*, 485 U.S. 415, 429-30 (1988). It does mean, however, that the Commission and the "courts properly may accord less weight to such [interpretations] than to administrative regulations which Congress has declared shall have the force of law." *General Elec. Co. v. Gilbert*, 429 U.S. at 141. "'The weight of such a judgment in a particular case will depend upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . .'" *Id.* at 142 (*quoting Skidmore*, 323 U.S. at 140). In no event, however, will the general rulemaking or enforcement authority of an agency give such non-binding statements of policy and procedure the power to control the courts. *Id.*; *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 204; *Batterton v. Francis*, 432 U.S. at 425 n.9.

4. Thus, the Secretary seriously errs in suggesting (Pet. Br. 18-20) that the deference issue here turns on Congress' conferral on her of so-called "policymaking" authority. Courts do not give agency interpretations *Chevron*-style deference simply because the agency has the capacity for exercising "policymaking" authority. Rather, courts give agency interpretations *Chevron*-style deference because, and only because, the interpretations constitute authoritative exercises of delegated lawmaking power. When the agency interpretations do not constitute such authoritative exercises of delegated lawmaking power, they do not receive *Chevron*-style deference.

B. Only The Commission Has Engaged In An Authoritative Exercise Of Delegated Lawmaking Power In This Case

The deference issue here thus turns not on which agency can make a greater claim to so-called "policymaking" authority, but which agency, if either, can

properly claim to have exercised delegated lawmaking authority. Only the Commission can properly claim to have done so here.

1. The Commission's interpretation of 29 C.F.R. § 1910.1029(g)(3) and, by incorporation, 29 U.S.C. § 1910.134(e)(5), constitutes an authoritative exercise of delegated lawmaking authority. The Commission developed its interpretation of these standards through its delegated administrative role of adjudication under the OSH Act. *See* 29 U.S.C. § 651(b)(3). It did so on the basis of the "training, education, or experience" that it is required by statute to have. *Id.* § 661(a). And it expressed its interpretation in a formal published order reached at the conclusion of a full administrative adjudication of questions of law and fact. *See id.* § 659(c). That order is self-executing and subject to reversal only by a court of appeals. *See id.* § 660. Such an "order" constitutes the kind of binding legal norm that routinely commands *Chevron*-style deference from the courts. *See, e.g., Fort Stewart Schools v. FLRA*, 110 S. Ct. at 2046; *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979). Thus, shortly after passage of the OSH Act, a panel of the Seventh Circuit, which included Justice (then-Judge) Stevens, stated:

> We note at the outset that the Occupational Safety and Health Review Commission is presumed to have technical expertise and experience in the field of job safety. A court must, therefore, defer to the findings and analysis of the Commission unless such findings are without substantial basis in fact . . . . The Act itself states: "The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive." . . . In addition, the Commission's interpretations regarding the meaning of the Act should be given substantial deference by a court.

Brennan v. OSHRC, 501 F.2d 1196, 1198-99 (7th Cir. 1974) (citations omitted).

2. By contrast, the Secretary's interpretive position is not embodied in any authoritative "rule" or "order."

The text of 29 C.F.R. § 1910.1029(g)(3) does not itself require fit testing of respirators in a test atmosphere. Moreover, 29 C.F.R. § 1910.134(e)(5) is on its face only a training standard. And the Secretary did not express her present interpretation of these standards in the preamble accompanying the proposed regulations, in the explanation issued with the final regulations, or in any post-promulgation rule. *See* 41 Fed. Reg. 46,742 (1976) (promulgation); 40 Fed. Reg. 32,286 (1975) (proposed regulation). Rather, the Secretary expressed her present view only in her compliance officer's citation of CF&I and in her solicitors' pleadings in support of that citation. These expressions of the Secretary's apparent interpretation are not sufficient to establish a legally binding norm.[5] Accordingly, they are not entitled to *Chevron*-style deference from the courts.[6]

3. Of course, as noted above (at 14-15) and in the decision below (Pet. App. 9a), the fact that the Secretary's interpretation is not eligible for *Chevron*-style deference does not mean that it is entitled to no weight

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[5] After the administrative hearing in this case was completed, OSHA issued an instruction to its compliance officers stating that they should begin requiring fit-testing of respirators in a test atmosphere. *See* OSHA Instruction CPL 2-2.29, *reprinted in* [1980-81 Transfer Binder] Employment Safety & Health Guide (CCH) ¶ 12,107. That instruction, which was not published in the Federal Register or in the Code of Federal Regulations, is nothing more than a discretionary enforcement guideline and thus, like the Secretary's litigation position in this case, does not establish the kind of binding legal norm that is entitled to *Chevron*-style deference from the courts. *See Batterton v. Francis*, 432 U.S. at 425 n.9; *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d at 536-39.

[6] For this reason, contrary to the Secretary's suggestion (Pet. Br. 24), there is no anomaly in the fact that the Secretary may receive *Chevron*-style deference in cases where she has advanced in court an authoritative position that has the force and effect of law (and thus the power to bind). Such authoritative interpretations would effectively receive *Chevron*-deference even if initially presented to the Commission; if the Commission rejected an authoritative "rule" or "order" of the Secretary that is not contrary to the statute, the Commission's decision would not be "in accordance with law." 5 U.S.C. § 706(2)(A).

at all. On the contrary, the Commission should be, and is, hesitant to substitute its reading of a regulation for the reading of the Secretary; and, accordingly, the Commission will reject the Secretary's view only when it lacks the power to persuade (because, for example, it is not a product of thorough consideration, is inconsistent with a regulation's language, or is inconsistent with earlier pronouncements). *See Gardebring v. Jenkins*, 485 U.S. at 430; *Skidmore*, 323 U.S. at 140. Here, however, the Commission reasonably concluded that the Secretary's interpretation is not persuasive (because it is a product of a compliance officer's mistake, is inconsistent with the regulations' language and structure, and is inconsistent with prior OSHA statements). *See* Pet. App. 36a-45a. Under *Chevron*, the Commission's reasonable conclusion was properly accorded "controlling weight" by the court below.[7]

C. The Secretary Misapplies The Allocation Of Administrative Authority Under The OSH Act

In arguing to the contrary, the Secretary relies on a series of arguments concerning the allocation of administrative authority under the OSH Act. These arguments are seriously misguided.

1. The Secretary principally argues (Pet. Br. 20, 28-31) that, because Congress conferred all rulemaking and enforcement power on her, her interpreations of the OSH Act and its implementing regulations are entitled to "controlling weight"—even if developed in the course of a prosecution. As explained above (at 10-15), this argument conflicts with sound principles of administrative law

[7] The AFL-CIO thus errs in suggesting (AFL-CIO Br. 3-6, 12-13) that the decision below ignores the rule that a court should not substitute its judgment as to the meaning of a rule for that of the rule's maker. The question for the court below was not whether to substitute its view for that of the Secretary; that was the question which the Commission faced. The question for the court below was whether to substitute its judgment for that of the only legally binding agency position in the case—*i.e.*, the Commission's order. The court below properly did not do so.

(which indicate that *Chevron*-style deference should attach only to authoritative exercises of delegated legislative power by an agency, and not merely to its conferral on the agency). In any event, this argument is belied by the structure and legislative history of the OSH Act itself.

a. The OSH Act reflects a deliberate choice by Congress to divide administrative power between the Secretary and the Commission. The Secretary is delegated the task of developing "mandatory occupational safety and health standards applicable to businesses affecting interstate commerce." 29 U.S.C. § 651(b)(3). In addition, the Secretary is to conduct investigations and, if warranted, issue citations alleging a violation of the standards. *See id.* §§ 657-658. The Act establishes the Commission, however, as the ultimate administrative decisionmaker on any citation, *id.* § 659, and the Secretary has the burden of convincing the Commission that the elements of an alleged violation—legal and factual—have been established. *See id.*; *see also Atlas Roofing Co. v. OSHRC*, 430 U.S. at 446. The statutory structure thus indicates that the Secretary's prosecutorial positions are not entitled to *Chevron*-style deference; rather, only her rulemaking-related interpretations are judicially binding.

b. As explained in greater detail in the brief *amici curiae* of the Chamber of Commerce of the United States *et al.* (at 13-19), the legislative history confirms the limited nature of the congressional delegation to the Secretary. As originally developed by the responsible Senate and House committees, the OSH Act combined the rulemaking, prosecutorial, and adjudicatory functions in the Secretary. *See, e.g.*, S. Rep. No. 1282, 91st Cong., 2d Sess. 8, 15 (1970), *reprinted in* Staff of the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* at 148, 155 (Comm. Print 1971) (*Legis. Hist.*). A competing proposal, supported by the Administration, called for the

creation of two independent boards to perform the rulemaking and adjudicatory functions, leaving only prosecution with the Secretary. *See id.* at 54, *reprinted in Legis. Hist.* at 193 (individual views of Sen Javits). Proponents of the Administration bill saw their approach as analogous to other "multimember independent administrative agencies," such as "the National Labor Relations Board," whose performance of "quasi-judicial adjudication" was seen as a more positive experience than that resulting from concentration of all power in one Department. *Id.* at 55, *reprinted in Legis. Hist.* at 194 (individual views of Sen. Javits). Indeed, one of the main points of attack was that the Committee versions envisioned the Secretary "essentially acting as prosecutor and judge." *Id.* at 56, *reprinted in Legis. Hist.* at 195 (individual views of Sen. Javits).

Ultimately, the dispute spilled out onto the Senate floor. Senator Javits introduced a floor amendment to the Committee bill proposing to establish only one independent board, which would perform the adjudicatory function, and would possess "the same type of authority that the Federal Trade Commission exercises." *Legis. Hist.* at 462 (remarks of Sen. Javits). During the ensuing debate, Senator Javits defended his proposal in part by pointing to the National Labor Relations Board (NLRB) as precedent; in doing so, he noted that Congress had installed a General Counsel to act as an investigative and prosecutorial counterpart to the NLRB's "quasi-judicial functions" for "precisely the reason" that he was arguing for creation of an independent adjudicatory body under the OSH Act. *Legis. Hist.* at 477 (remarks of Sen. Javits). The Javits amendment passed by a 43-38 vote, and the structure that it established was adopted by the Conference Committee. *Legis. Hist.* at 1147 (remarks of Sen. Williams).

The legislative history thus confirms that the final administrative structure of the OSH Act represented a deliberate legislative compromise. While the Secretary

was given full rulemaking power, Congress also avoided conferring too much power on her. Instead, it imposed substantial procedural requirements on the exercise of her rulemaking powers; and, importantly, it generally declined to give the Secretary the power to develop binding interpretations through adjudication, thereby denying the Secretary a regulatory choice that most administrative agencies have. *See SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965).[8]

2. The Secretary also argues (Pet. Br. 21-24, 31-33) that Congress conferred no "policymaking" authority on the Commission and, accordingly, that its view cannot qualify for *Chevron*-style deference. Of course, as noted above (at 11-15, 16-17, 18-21), even if this argument were valid, it would not establish that the Secretary's views are entitled to judicial deference. In all events, the argument is unfounded.

a. As the court below noted (Pet. App. 7a), the OSH Act endows the Commission with the normal complement of adjudicative powers possessed by traditional administrative agencies. *See* 29 U.S.C. § 659(c), 661. The normal complement of adjudicative powers possessed by administrative agencies includes the power to "declare" the law—or, more specifically, to declare "what the law was." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 221 (Scalia, J., concurring). And, as this Court has long recognized, the power administratively to declare "what

[8] The Secretary makes much of the Senate committee's belief that a sounder safety and health program would result if the responsibility for formulating rules was assigned to the same administrator who was responsible for those rules' enforcement. *See* Pet. Br. 30-31. But the Senate committee's belief simply shows that the Congress believed that better rules would result if these functions were combined. It does not show that Congress intended for the administrator who had these two functions to be able in administrative litigation to trump the Commission's interpretation of what ambiguous rules were intended to require.

the law was" includes a substantial policymaking component. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-94 (1974); *SEC v. Chenery Corp.*, 332 U.S. at 202-03. Thus, there is every reason to conclude that "the Commission was designed to have a policy role" (*Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1262 (4th Cir. 1974)); indeed, as noted above (at 19-21), the legislative history of the OSH Act makes it clear that the Commission was modelled after the NLRB and the Federal Trade Commission, two agencies which have long been recognized to exercise policymaking authority through adjudication.

b. The Secretary plainly errs in suggesting (Pet. Br. 23-24) that the adjudicatory power to "declare" the law may serve as a vehicle for the formulation of policy only when the rulemaking power also resides in the agency. The adjudicatory and rulemaking powers are separate and independent administrative powers (and have, as their principle differences, only the immediacy of their consequences and the procedural requisites for their change). *See NLRB v. Bell Aerospace Co.*, 416 U.S. at 292-94; *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 221 (Scalia, J., concurring). Divesting an agency of one of these powers does not by itself diminish the agency's authority with respect to the other power.[9] It simply

[9] For example, in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, Congress divided the administrative functions of the old Civil Service Commission between two new agencies: The Office of Personnel Management (OPM) and the Merit Systems Protection Board (MSPB). S. Rep. No. 969, 95th Cong., 1st Sess. (1978) 4-5, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2726-27. OPM was to have central responsibility for "personnel management," while the MSPB was designed to "adjudicate cases." *Id.* at 5-6, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 2727-28; *see also* 5 U.S.C. § 1204(a)(1); 5 C.F.R. § 1200.1. The MSPB's members, like the Commission's, must have expertise and are appointed by the President with the advice and consent of the Senate. 5 U.S.C. § 1201. And, like the Commission, the MSPB has no substantive rulemaking authority. *See id.* §§ 1204(e)(2)(B), 1204(h). Yet, the courts of appeals, recognizing the MSPB's status as an "independent adjudicatory bod[y]," have granted the agency *Chevron*-style deference. *See, e.g., United States v. Paddack*, 825 F.2d 504, 513 (D.C. Cir. 1987). Indeed, this Court's decision in *Cornelius v. Nutt*, 472 U.S. 648, 659 (1985), was grounded in part on *Chevron*-style deference to the MSPB.

Similarly, the Board of Immigration Appeals (BIA) has been established by the Attorney General to "perform the quasi-judicial function of adjudicating cases" under the Immigration and Nationality Act. 8 C.F.R. § 3.1(a)(3). Despite a lack of any substantive rulemaking power, *id.* § 3.1(d)(3), the BIA's statutory and regulatory interpretations have often been accorded *Chevron*-style deference. Indeed, in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 445-49 & n.29 (1987), the Solicitor General argued that the BIA's construction of the Immigration and Nationality Act was entitled to controlling weight under *Chevron*, and the Court made clear that it believed such deference would have been due the BIA had the analysis progressed to that point in that case. The courts of appeals have routinely granted *Chevron*-style deference to the BIA. *See, e.g., Perlera-Escobar v. Executive Office for Immigration*, 894 F.2d 1292, 1296 (11th Cir. 1990); *Campos-Guardado v. INS*, 809 F.2d 285, 289 (5th Cir.), *cert. denied*, 484 U.S. 826 (1987).

denies the agency the flexibility that derives from having both powers available to it.[10]

c. The Secretary and the AFL-CIO further err in suggesting (Pet. Br. 22 & n.19, 23 n.21, 33; AFL-CIO Br. 7-8, 12-14) that the Commission's role in this scheme is, at most, like that of a district court.[11] Unlike a dis-

[10] *See NLRB v. Bell Aerospace Co.*, 416 U.S. at 292-94 (describing flexibility); *SEC v. Chenery*, 332 U.S. at 202-03 (same); Shapiro, *supra*, 78 Harv. L. Rev. at 921 (same).

[11] The AFL-CIO goes so far as to suggest (AFL-CIO Br. 7-8) that the Commission is a mere "fact-finder" and has no role "in interpreting the law or the Secretary's standards." Even the Secretary does not make such an outlandish suggestion. *See* Pet. Br. 21-23 (conceding that, like a district court, Commission has power to make declarations of law). While the statute does state that the Commission's orders must be based on "findings of fact," it does not say that those orders may not include conclusions of law (which of course they may and do). *Accord, Brennan v. Gilles & Cotting, Inc.*, 504 F.2d at 1262; *Brennan v. OSHRC*, 492 F.2d 1027, 1032 (2d Cir. 1974). Indeed, by directing the Commission (29 U.S.C. § 659(c)) to conduct itself in accordance with the APA, the OSH

trict court, the Commission is part of the very administrative framework in which Congress vested the discretion for implementing the OSH Act. 29 U.S.C. § 651 (b)(3). Moreover, unlike a district court, the Commission is technically expert and experienced in the field of job safety and health. *Id.* § 661(a). Finally, unlike a district court, the Commission is composed of political appointees who are, at least indirectly, democratically accountable. *Id.* It is precisely these factors that led the Court in *Chevron* to hold that courts must give "controlling weight" to the authoritative judgments of administrative agencies like the Commission. *See Chevron*, 467 U.S. at 842-45, 864-66.

d. Finally, the Secretary errs in suggesting (Pet. Br. 31-33) that a rule requiring deference to the Secretary's interpretation (and not the Commission's interpretation) is consistent with the purposes for which the Commission was created. As explained in greater detail in the brief *amici curiae* of the Chamber of Commerce of the United States *et al.* (at 13-19), the legislative history shows that the regulated community viewed the Secretary as the "voice of labor" and that the Commission was created in order to reassure the regulated community that the adjudicatory process would be a fair and efficient one. Conferring *Chevron*-style deference on the Secretary's interpretation of an ambiguous regulation (and denying it to the Commission) would be directly inconsistent with this objective: It would confer on the very administrative official whom the regulated community feared vast discretion unfairly to bend the law to the facts of particular cases. And it would seriously cripple the administrative agency that was supposed to provide

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Act contemplates that the Commission will decide questions of law. *See* 5 U.S.C. § 557(c)(3)(A). Moreover, the statutory provisions authorizing the NLRB to issue unfair labor practice orders are almost identically worded to the OSH Act provisions that authorize "orders" by the Commission, *compare* 29 U.S.C. §§ 160(c), (e), (f) *with* 29 U.S.C. §§ 659(c), 660, and there is no plausible argument that the NLRB is a more "fact-finder."

the regulated community with an independent analysis of legal and factual claims under the OSH Act. As the Second Circuit has stated, the Commission's statutory role "'does not permit it to act as an umpire blandly calling balls and strikes for the adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.'" *Brennan v. OSHRC*, 492 F.2d at 1032.

3. The Secretary next suggests (Pet. Br. 24-27) that a number of "practical considerations" support deference to her interpretations. They do not do so.

a. The Secretary first suggests (Pet. Br. 25-26) that only she has a sufficiently broad perspective to interpret the meaning of the regulations that she has crafted. Of course, the Secretary did not even craft the regulation which, by incorporation, is in issue in this case.[12] In any event, the Commission is statutorily "presumed to have technical expertise and experience in the field of job safety." *Brennan v. OSHRC*, 501 F.2d at 1198. Moreover, "it is the Commission and not the Secretary which is charged with the final administrative adjudication of the Act." *Brennan v. OSHRC*, 513 F.2d 713, 715-16 (8th Cir. 1975). Indeed, while the Commission reviews only contested citations, every citation is deemed a final order of the Commission. 29 U.S.C. § 659(a). Thus, the Secretary's alleged vision with respect to the regulations cannot properly form the basis for judicial deference to her; Congress deemed the Commission to have this vision, and gave it the authority to resolve interpretive questions arising in the adjudicative process.[13]

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[12] As noted above (at 4-6), the substantive standard at issue is 29 C.F.R. 1910.134(e)(5), which is incorporated by and made applicable through 29 C.F.R. § 1910.1029(g)(3). The Secretary did not craft 29 C.F.R. § 1910.134(e)(5). It was part of a general respiratory protection standard developed by a private organization, ANSI, and later adopted by the Secretary pursuant to 29 U.S.C. § 655(a) without notice and comment procedures.

[13] In any event, the evidence that the Secretary cites does not support the conclusion that she reaches. While only a small portion

b. The Secretary next suggests (Pet. Br. 26-27) that a rule of deference to the Commission, rather than to the Secretary, would "undermine the stability of the OSH Act regime." But this precise rule of deference to the Commission has prevailed in a large number of judicial circuits, and there is no evidence that any such destabilization has occurred there. Nor is there any reasonable basis for believing that it would do so in the future: The Secretary remains free to resolve any ambiguity in a way that would bind the Commission—by engaging in rulemaking. Moreover, the Secretary remains free in the adjudicatory process to attempt to persuade the Commission that her interpretations of ambiguous rules are the most reasonable ones. And, in all events, as Professor (now-Deputy Solicitor General) Shapiro has noted, the Secretary has available to her "the many less formal alternatives that can constitute the beginning and end of the administrative process"—such as "the 'lifted eyebrow,' backed by a veiled or express threat of prosecution, . . . or of publicity, [which] can be an effective means of declaring and applying policy free from the restraints of judicial review." Shapiro, *supra*, 78 Harv. L. Rev. at 923. In short, the fears that the Secretary expresses here are incredible and, in the final analysis, simply constitute an objection to the congressional division of administrative authority under the OSH Act.

c. Finally, the Secretary makes the outrageous suggestion (Pet. Br. 27, 37) that a rule of deference to her is necessary in order to ensure that CF&I does not "escape liability." This suggestion shows absolutely no respect for either the rule of law or orderly procedure.

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of OSHA's overall activities lead to contested citations, the absolute number of such contested actions is still quite large—by the Secretary's own count, approximately 15,695 citations in fiscal year 1988 alone. Moreover, the cases in which legal issues are involved, and in which the deference issue is likely to be relevant, are just these contested cases; the uncontested citations are consensual resolutions that involve no significant issue about the scope of OSHA's standards and thus do little to enhance anyone's "vision of the program."

Moreover, it ignores the fact that CF&I would likely have been held in violation had the compliance officer cited it for a violation of the correct OSHA regulation, or had the Secretary's solicitors moved to amend the citation to do so. Indeed, CF&I is subject to the obligations contained in that regulation (29 C.F.R. § 1910.1029(g)(4)(i)), which remains in force. That the compliance officer and the Secretary's solicitors elected to make a "test case" out of CF&I's conduct is simply not a proper basis for deciding that the Secretary's prosecutorial interpretations should get judicial deference; indeed, it confirms that they should not.

4. The Secretary's final tack is to seize upon snippets from decisions involving different statutes and claim that such "analogous schemes" support deference to her (and not to the Commission) here. As explained in even greater detail in the brief *amici curiae* of the Chamber of Commerce of the United States *et al.* (at 24-27), this claim is also meritless.

a. The Secretary first argues (Pet. Br. 33-34) that this Court's conclusion in *Pepco*—that the Benefits Review Board is not a "policymaking" agency and thus is not entitled to special deference from the courts—is equally applicable to the Commission. But the statement in *Pepco* appears only in a footnote, and plainly constitutes *dicta* (since the Court in that case had already found the agency interpretation at issue to be at odds with the statutory scheme); indeed, as the Secretary concedes (Pet. Br. 34 n.33), at least two courts of appeals have declined to follow it. Moreover, there is clearly no basis for extending that *dicta* to this statutory scheme—which, in contrast to the LHWCA scheme, involves an independent agency established for the very purpose of dividing administrative authority.

b. The Secretary also argues (Pet. Br. 35-36) that the deference afforded to her interpretations under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, should be afforded to her interpretations under

the OSH Act. But, again, these are two different statutory schemes, and the Secretary does not even begin to justify her assertion that the intent of Congress under the OSH Act is the same as the intent of Congress under the Mine Act. In any event, as the Secretary concedes (Pet. Br. 36 n.35), courts have disagreed about the appropriate deference to be accorded to the interpretations of her and the Federal Mine Safety and Health Review Commission under the Mine Act; and the cases and legislative history that she cites are generally consistent with the argument advanced here—*i.e.*, that only administrative actions creating binding legal norms should have the "power to control," while administrative actions lacking such authority should have only the "power to persuade." [14]

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[14] *See Secretary of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1436-38 (D.C. Cir. 1989) (giving "controlling weight" to authoritative pronouncement of Secretary); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d at 537-38 (taking Secretary's interpretation for its persuasive value); *Brock v. Peabody Coal Co.*, 822 F.2d 1134, 1136 (D.C. Cir. 1987) (rejecting Secretary's construction and affirming Mine Safety Commission); S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977) ("weight" shall be given to Secretary's interpretations).

The Secretary errs in repeatedly citing Justice (then-Judge) Scalia's opinion in *Cathedral Bluffs* as support for her position in this case. That opinion merely held that, in reviewing whether an enforcement policy of the Secretary is a "binding norm," a court owed no deference to the Mine Safety Commission, and a "not overwhelming" degree of deference to the Secretary. 796 F.2d at 537. Both conclusions appear correct to us (since neither the Mine Safety Commission nor the Secretary administers the APA, and since the guideline in issue concerned the Secretary's prosecutorial discretion). In any event, in reaching the former conclusion, the opinion was simply following prior circuit precedent; and, in reaching the latter conclusion, the opinion was merely recognizing that the Secretary's view of the legal effect of her own actions, while worthy of consideration, is not entitled to *Chevron*-style deference.

CONCLUSION

The judgment of the court below should be affirmed.[15]

Respectfully submitted,

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September 1990

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[15] The filing of this brief amicus curiae in support of the Respondents has been authorized by the Solicitor General.